Filed 7/19/19 P. v. Santacruz CA6
Received for posting 7/22/19

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE SANTACRUZ, III, Defendant and Appellant.	H042630 (Santa Clara County Super. Ct. No. C1244730) **ORDER MODIFYING OPINION AND DENYING REHEARING** **NO CHANGE IN JUDGMENT**

THE COURT:

The court orders that the opinion filed June 24, 2019, be modified as follows:

On page 31, after the first full paragraph, and preceding the Disposition, the following subsection is added:

E. Cumulative Prejudice

Santacruz asserts that even if none of the claimed errors, by themselves, was prejudicial, the cumulative effect of those asserted errors requires reversal. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 (*Hill*) ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].)

"Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' " (*People v. Williams* (2009) 170 Cal.App.4th 587, 646 (*Williams*).) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

In this case, we have found that there was insufficient evidence presented at trial to support predicate offenses two, three, and four under *Prunty*. We have also found that Officer Le testified to inadmissible hearsay when he relayed case-specific information about predicate offenses one, two, three, and five pursuant to *Sanchez*. Santacruz asserts that the cumulative effect of the *Prunty* and *Sanchez* errors in this case requires reversal. Specifically, Santacruz argues that absent the inadmissible hearsay used to describe predicate offenses one and five, there is insufficient evidence that the crimes were committed for the benefit of the Norteños, and therefore, the gang enhancement must be reversed.

We do not agree. There was sufficient evidence to support the gang enhancement through non-hearsay information about predicate offenses one and five, including court records. In addition, Officer Le offered ample non-hearsay evidence about the Norteño gang and the gang-related nature of Santacruz's crime.

Reversal is not required in this case even considering the cumulative effect of the errors. Based on our review of the record, we do not find that it is "reasonably probable the jury would have reached a result more favorable to defendant in [the] absence[]' "of the errors. (*Williams*, *supra*, 170 Cal.App.4th at p. 646.) We "will not reverse a judgment absent a clear showing of a miscarriage of justice." (*Hill*, *supra*, 17 Cal.4th at p. 844.) No such showing has been made here.

The petition for rehearing filed on behalf of Santacruz is denied.

There is no change in the judgment.

Dated:

_____

Greenwood, P.J.

_____

Bamattre-Manoukian, J.

_____

Grover, J

Filed 6/24/19 P. v. Santacruz CA6 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE SANTACRUZ, III, Defendant and Appellant.	H042630 (Santa Clara County Super. Ct. No. C1244730)

Appellant Jose Santacruz, III, and codefendants Julio Marfil, Miguel Marfil, and Victor Romero assaulted Sakuma Wilson. Santacruz was convicted following a jury trial of two counts of assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)),[1] and one count of resisting, delaying or obstructing a police officer (§ 148). The jury found Santacruz committed the assaults for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(A).) The trial court found true two prior serious or violent felony convictions ("strikes") (§§ 667, subds. (b)-(i); 1170.12), and one prior serious felony conviction (§ 667, subd. (a)(1)).

On appeal, Santacruz argues that the gang enhancement under section 186.22, subd. (b)(1)(A), must be stricken in accord with our Supreme Court's opinion in *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), because the prosecution failed to prove that the predicate offenses it offered in evidence were connected to the larger Norteño gang that Santacruz sought to benefit. Santacruz argues that the gang expert testified to

[1] All further statutory references are to the Penal Code.

inadmissible hearsay pursuant to *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). He contends there is insufficient evidence to support his conviction for resisting arrest (§ 148). He also argues that the matter should be remanded to the trial court for a hearing under Senate Bill 1393 to determine whether that court should exercise its discretion to strike the prior serious felony conviction (§ 667, subd. (a)(1)).

We remand the matter for the trial court to exercise its discretion under Senate Bill 1393 with respect to the prior serious felony conviction (§ 667, subd. (a)(1)). In all other respects, we affirm the judgment.

I. STATEMENT OF THE FACTS AND CASE

A. Percipient Witness Testimony

Around midnight on November 9, 2012, Santacruz and four other men, including codefendants, Julio Marfil, Miguel Marfil, and Romero, were in the alley outside of Smoke Eaters restaurant in downtown San Jose. The men surrounded Sukuma Wilson, who was in his late 20's or early 30's. Wilson was talking to the five men, and walked away from them. The men followed him and were seen punching and kicking him for two to three minutes. Wilson fell to the ground during the attack and used his hands to protect his head and to block the punches. After a short time, the men left. Santacruz, Julio Marfil and Miguel Marfil returned and began attacking Wilson a second time. Eventually, police arrived and Santacruz, Julio Marfil, Miguel Marfil and Romero were arrested.

Mauricio Muñoz testified that around midnight on November 9, 2012, he was at Smoke Eaters restaurant in downtown San Jose with his brother Ivan Muñoz and Jonathan Martinez. He was sitting next to a glass wall that looked out onto an alley. Mauricio saw five Hispanic men, four of whom were later identified as Santacruz, Julio Marfil, Manuel Marfil and Romero, surround an African-American man, who was later identified as Sakuma Wilson. Mauricio heard one of the men shout: "What's up?" Mauricio also saw one of the men wearing a red hat, and another was wearing a red shirt.

Mauricio saw one of the men punch Wilson in the torso, and then all five of the men started to hit and kick Wilson. Wilson put his fists up to this head to protect himself, and the men punched him about 25 to 30 times, and kicked him about 10 to 15 times. After a short time, the five men left.

Mauricio stood up from his seat and went to the back door of the restaurant. He saw three of the men come back and start attacking Wilson by hitting and kicking him. Mauricio saw the fourth man come back, but that man did not attack Wilson. The police arrived about 10 to 20 seconds into the second attack.

Ivan Muñoz testified that he was at Smoke Eaters restaurant with his brother, Mauricio, and saw a fight break out in the alley. He saw five Hispanic men start hitting Wilson. Wilson fell and the men started to kick him. Ivan testified that all of the men attacked Wilson, and that Wilson was punched about 30 times and kicked about 25 times. The men left, and came back a few minutes later. Three of the men started kicking and punching Wilson again, and the fourth man stood by and did not attack Wilson. One of the men wore a red hat, and another wore a red shirt.

Ivan stated that when the police arrived, one of the officers kept telling the men to get onto the ground. The four men got down on the ground, but one of the men kept trying to get up. The officer kicked the man in the face, and Ivan saw a large pool of blood.

Jonathan Martinez testified that he was at Smoke Eaters restaurant with Mauricio and Ivan when he saw five Hispanic men surrounding Wilson in the alley. The five men left and three of them returned and started beating Wilson again. One of the men was wearing a red San Francisco hat, and another was wearing a shirt with red stripes. Martinez testified that he recognized the five men as having been at Smoke Eaters restaurant that night while he and his friends were there.

Ruben Rivera testified that he was the assistant manager of Smoke Eaters restaurant in San Jose. He saw five Hispanic men and Wilson in the alley by the

restaurant. They started shoving each other, and Rivera heard some of the men say to Wilson multiple times: "What do you bang?" The five men punched and kicked Wilson, and he heard the word "Norte" said at least three times. Rivera's boss went out into the alley and yelled at the men that they needed to move on or stop fighting. One of the men came up to the manager and said: "What do you bang? Do you want some, too?" The five men left, but came back after a short time.

During Rivera's call to 9-1-1, he told the operator that the men were saying "Norte" during the attack. On cross-examination, Rivera testified that he told a defense investigator in an interview in September of 2013 that he did not hear any gang language.

San Jose Police Officer Jonathan Byers testified that on November 9, 2012, he was on patrol, parked about one block from Smoke Eaters restaurant, and he heard on dispatch that there was 9-1-1 call about a fight. When he entered the alley by the restaurant, he saw five Hispanic men attacking Wilson. Officer Byers saw the five men stop attacking Wilson and walk away toward a stairwell to an underground garage. Officer Byers checked his surroundings and when he looked back at the men, two had disappeared and there were only three that he could see walking toward the stairwell. In court, Officer Byers identified Santacruz as one of the men walking toward the stairwell. He also identified Santacruz's codefendants, Julio Marfil and Miguel Marfil as the other two men with Santacruz walking toward the stairwell.

Officer Byers pointed his gun at the three men and yelled at them to freeze. Julio Marfil and Miguel Marfil moved to either side of the alley, and Santacruz stayed in the middle. The three men squatted when Officer Byers yelled at them to get down. Officer Byers saw Julio Marfil reach toward his waist, so he kicked him in the rib area. Officer Byers continued yelling for the men to get down, and Santacruz continued squatting. Santacruz reached into his jacket, and Officer Byers yelled at him not to. Santacruz reached into his jacket again, and Officer Byers kicked him in the face. Santacruz fell down on the ground with his face on his hands. Additional officers arrived and came up

behind Officer Byers. There was a pool of blood in the alley from the bleeding on Santacruz's face.

San Jose Police Officer Rocky Zanotto arrived at the scene and came up behind Officer Byers. Officer Zanotto saw Officer Byers ordering the men to the ground, and Officer Zanotto drew his own gun and also ordered the men to the ground. The men did not get all the way down, staying on one knee. Officer Byers continued yelling at Santacruz to show his hands. Officer Zanotto saw that Santacruz had one hand tucked into his waist. Officer Zanotto then handcuffed Miguel Marfil. Officer Zanotto did not see Officer Byers kick Santacruz in the face, but he did see Santacruz bleeding from the face.

The victim, Sukuma Wilson, was interviewed at the scene shortly after the attack. When police asked him if he believed the attack was gang-related, he said that it was not. Wilson said that the only thing the men said to him during the attack was: "What's up?"

B. Expert Gang Testimony

San Jose Police Officer Clayton Le testified as an expert in criminal street gangs. Officer Le said that the Norteños are a criminal street gang with more than 200 members. The Norteños are derived from and take their direction from the Nuestra Familia prison gang. The prison gang is very structured and uses a constitution. An immediate step down from the Nuestra Familia is the "Northern Raza" or "Northern Structure," which Officer Le described as the "junior varsity of Nuestra Familia." The "Northern Cause" is a document that establishes the reason people affiliate with the Norteño organization.

The Norteño signs and symbols are the color red, a Huelga bird, the number 14, the letter "N," and the words "Norte" and "puro Norte." The rivals of the Norteños are the Sureños. The Norteños generally claim the whole city of San Jose, but certain subsets of the gang may claim specific geographic areas. Two of the specific neighborhoods are the El Hoyo Palmas and the Seven Trees Norteños. Officer Le stated that there are many unaffiliated Norteño gang members in San Jose who do not associate with a specific

geographical area. Officer Le opined that turfs or neighborhoods were not as important as in the past because of people's increased overall mobility. If gang members believe that someone may be a member of a rival gang, they will "check" the person by saying things such as: "Do you bang?" "Are you down?" or "What do you claim?" These comments are followed by an assault regardless of the person's answer to the questions. The area in San Jose where the crimes occurred in this case is not claimed by any gangs. The primary activities of the Norteños include, "attempted murder, assault with a deadly weapon, murder, robbery, vehicle theft, possession for sales of narcotics, illegal weapon possession," and "assault with force likely to produce great bodily injury." Gangs commit these crimes for respect, fear, retaliation against rivals, and to expand their territory for narcotic sales.

1. Santacruz's Gang Affiliation

Officer Le testified that he believed that Santacruz was a member of the Norteños. Officer Le testified about prior contacts Santacruz had with the police based on information the officer reviewed in police reports written by other law enforcement officers. The most recent incident occurred on January 6, 2012. The police report for that date stated that Santacruz had a "P" tattoo on the right side of his neck and that he was wearing a red Houston Astros hat. Santacruz was asked: "Are you a Northerner or Norteño?" to which Santacruz said: "Northerner." When the officer asked Santacruz: "Who do you kick it with?" Santacruz said: "Nobody." During the January 6, 2012 incident, Santacruz was a passenger in a car with Juan Martinez, a self-admitted and documented Norteño.

Santacruz had contact with police in a second incident on January 25, 2010. The report stated that the officer asked Santacruz about his "P" tattoo, and Santacruz told him that it was for "Park Side Mob," a Norteño subset gang. Santacruz told the officer that the subset no longer existed. Santacruz told the officer that he had not been "jumped in," or initiated, into the gang. During the January 25, 2010 incident, Santacruz was with

Jacob Rodriguez, and Jesse Aguilar, both documented Norteño gang members of the Barrios Rio Seco subset.

Santacruz's third contact with the police took place on May 22, 2002. Santacruz pled guilty to two felony assaults with gang enhancements, and admitted to being a Norteño. The victim of Santacruz's assaults was a Sureño. A certified court record of the convictions and the gang enhancement was admitted into evidence.

Officer Le opined that the events of the present case also demonstrate Santacruz's gang membership. During the attack, Santacruz was wearing a red baseball hat and had a "P" tattoo, which are indicative of membership in the Norteño gang. He was also associating with other gang members during the attack, and a witness heard one of the men say "Norte, Norte, Norte," in reference to the Norteño gang. Officer Le believed that Santacruz committed the current crime for the benefit of the Norteños.

2. Codefendants' Gang Affiliations

Officer Le testified that he believed Santacruz's codefendants Julio Marfil, Miguel Marfil, and Victor Romero are Norteños. With regard to Julio Marfil, Officer Le testified that he believed Julio Marfil to be a Norteño based on his tattoos, prior police contacts, and admissions. Officer Le testified about three incidents on October 19, 2012, June 4, 2011, and October 16, 2010, when Julio Marfil had contact with police. During all of the incidents, Julio Marfil was associating with known Norteños. Officer Le gleaned information about the October 19, 2012 incident from the computer aided dispatch ("CAD") report. For the October 16, 2010 and June 4, 2011 contacts, Officer Le testified about information from the police reports. On October 16, 2010, Julio Marfil was wearing a red belt, red shirt, a hat with a red San Francisco Giants logo, and had a "4-0-8" tattoo on his chest. During his contact with police, Julio Marfil admitted that he had been a "Northerner" since high school. In addition, Officer Le believed that given the facts of the present case, Julio Marfil is a Norteño gang member.

Officer Le believed Miguel Marfil was a Norteño, based on the facts of the present case, and his prior police contacts, and admissions. Officer Le reviewed the police report from two prior police contacts with Miguel Marfil. The most recent contact occurred on August 25, 2012, when Miguel Marfil was found in a car with codefendant Victor Romero and other Norteños. Miguel Marfil had a "4-0-8" tattoo on his right arm. Officer Le testified about a second contact that occurred on April 26, 2008, based on a field identification card. During a traffic stop on that date, Miguel Marfil admitted to being a Norteño. He was wearing a red shirt and red and white shoes and had "4-0-8" and a shark tattoo on his right arm. The traffic stop was in a Norteño-affiliated area.

Officer Le testified that he believed codefendant Victor Romero was a Norteño based on the facts of this case, as well as his prior police contacts, and admissions. Officer Le reviewed a CAD report from an incident that occurred on October 19, 2012, and police reports for incidents that occurred on August 25, 2012, and December 13, 2009. The October incident involved Romero and codefendant Julio Marfil. The August incident involved Romero and codefendant Miguel Marfil. Regarding the August incident, police saw tattoos on Romero depicting happy and sad faces, which are commonly associated with gang members. During the December incident, Romero was with a "BRS Norteño gang member," and he admitted that he associated with Norteños.

Officer Le testified about Anthony Rocha, a man who was with Santacruz and codefendants during the incident in the present case. Officer Le believed Rocha was a Norteño gang member based on the facts of this case, his prior police contacts, and admissions. Officer Le reviewed a CAD report from an incident that occurred on September 5, 2011, and police reports for incidents that occurred on May 22, 2010, and August 2, 2006. During the September incident, Rocha was stopped in a Norteño neighborhood, and was seen with two tattoos commonly associated with gang members. At the time, Rocha admitted to "banging" with one of the Norteño subsets. During the May incident, Rocha was wearing a white t-shirt, a red undershirt, black jeans, and black

Cortez shoes that are commonly worn by gang members. Rocha was also wearing a belt that had a "P" logo on it, which can represent one of San Jose's Norteño subsets. During the August incident, Rocha admitted to being a Northerner and was located in a Sureño area in gang-related clothing. Rocha was a juvenile at the time and admitted to an assault charge with a gang enhancement.

3. Hypotheticals Based on Current Case

Officer Le reviewed two hypotheticals that were factually similar to the present case—one including information describing the first assault, and another, the second assault. In the hypothetical similar to the first assault, one of the men asked the victim: "What do you bang?" and the word "Norte" was repeated three times. Based on those facts, Officer Le believed that the assault was committed for the benefit of and in association with a criminal street gang. The benefit gained from the assault is community respect based on a showing of strength. Because the men in the hypothetical acted together in committing the crime, the assault was in association with the gang, and promoted and assisted the gang in the community.

Regarding the hypothetical involving the facts of the second assault, Officer Le believed that the crime was committed for the benefit of and in association with a criminal street gang. Officer Le stated that even if the only statements made by the group during the second attack had been: "What's up?" and no one said: "Norte" or "What do you bang?" the assaults still would have been committed for the benefit of a criminal street gang. The assailants' use of "What's up" was a form of "checking."

4. Predicate Offenses

Officer Le testified about five predicate offenses that were committed by the Norteños or Norteño subsets. The testimony was based on Officer Le's review of the police reports for the crimes. In addition to Officer Le's testimony, the court admitted into evidence certified copies of court documents showing that the defendants were convicted of the crimes and gang enhancements.

The first predicate offense (predicate offense one) occurred on July 25, 2011. Sunny Alas and Eliezar Palacios confronted the victim and his friends, and asked them if they "banged." The victim said: "No" and Alas and Palacios stabbed the victim multiple times and ran away. Both men were convicted of assault with a deadly weapon (§ 245, subd. (a)(1)), with a gang enhancement (§ 186.22, subd. (b)(1)(A)). Palacios was a Norteño, and Alas was a member of the United Crips Gangsters. Officer Le believed that the crime was committed for the benefit of and in association with a criminal street gang.

The second predicate offense (predicate offense two) occurred on December 15, 2011. Manuel Funtes was in possession of a stolen semi-automatic weapon in a known gang house located in an area claimed by the El Hoyo Palmas subset of the Norteños. Funtes was convicted of possession of a firearm by a felon (§ 12021, subd. (a)(1)), with a gang enhancement (§ 186.22, subd. (b)(1)(A)). Officer Le testified that he believed that Funtes was a member of El Hoyo Palmas subset based on his "EHP" tattoo, a four-dot tattoo, and his prior admissions and contacts with law enforcement. Officer Le believed the possession of the weapon was committed for the benefit of the Norteño criminal street gang.

The third predicate offense (predicate offense three) occurred on August 14, 2011. Armando Mata and Manuel Sandoval punched, kicked and hit the victims with a baseball bat to retaliate when fellow members of their gang were kicked out of a party. Mata and Sandoval were convicted of assault with a deadly weapon (§ 245, subd. (a)(1)), with a gang enhancement (§ 186.22, subd. (b)(1)(A)). Officer Le testified that Mata and Sandoval were members of the El Hoyo Palmas subset of the Norteños, and that the crime was committed for the benefit of, at the direction of, or in association with the Norteños.

The fourth predicate offense (predicate offense four) occurred on January 1, 2012. Officer Le was the lead investigator on the case. Ezekiel Tadayo, Justin Del Le Garza Daniels, and Jaime Perez, Jr. walked up to the victims, who were having a barbeque in

the early hours of New Year's Day and yelled: "This is Norte 400 block." They attacked and beat the victims. The three men were convicted of assault with a deadly weapon (§ 245, subd. (a)(1)), with a gang enhancement (§ 186.22, subd. (b)(1)(A)). Officer Le testified that the three individuals were members of a Norteño subset, Seven Trees Norteños, and that the crime was committed for the benefit of, at the direction of, or in association with the Norteños.

The fifth predicate offense (predicate offense five) occurred on July 21, 2011. Gabriel Valverde, Anthony Sunsuri, and Efrain Agosto punched and stabbed a man in St. James Park after asking him if he was a "scrap," which is another term for a Sureño. Valverde and Sunsuri were convicted of attempted murder (§§ 187; 664, subd. (a)), with a gang enhancement (§ 186.22, subd. (b)(1)(A)), and Agosto was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)), with a gang enhancement (§ 186.22, subd. (b)(1)(A)). Officer Le testified that the three defendants were Norteño gang members and the crimes were committed for the benefit of, at the direction of, or in association with the Norteños.

As to all of the predicate offenses, Officer Le testified that even though some involved members of Norteño subsets, the crimes were all "under the Norteño rubric."

C. Verdict, Sentence and Judgment

On May 30, 2013, Santacruz was charged by information with two counts of assault with force likely to produce great bodily injury (§ 245, subd. (a)(4); counts 1 & 2), and one count of resisting, delaying or obstructing a police officer (§ 148; count 3). The information alleged that Santacruz committed counts 1 and 2 for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(A).) The information also alleged that Santacruz had been convicted of two prior serious or violent felonies ("strikes") (§§ 667, subds. (b)-(i); 1170.12), one prior serious felony (§ 667, subd. (a)(1)), and that he had served one prior prison term (§ 667.5, subd. (b)).

On January 17, 2014, a jury found Santacruz guilty of all counts, and found the gang enhancements as to counts 1 and 2 true. (§ 186.22, subd. (b)(1)(A).) The court found the prior serious and violent felony convictions ("strikes") and the prior serious felony conviction true. (§§ 667, subds. (b)-(i); 1170.12; 667, subd. (a).) The court found that the prison prior had not been proven. (§ 667.5, subd. (b).)

On July 10, 2015, the trial court struck the two prior serious or violent felony convictions ("strikes"). The court sentenced Santacruz to a total of nine years in state prison as follows: two years on count 1 (§ 245, subd. (a)(4)), two years consecutive for the gang enhancement (§ 186.22, subd. (b)(1)(A)), and five years further consecutive for the prior serious felony conviction (§ 667, subd. (a)). The court imposed the same sentence on count 2 to run concurrent to the sentence on count 1. On July 13, 2015, Santacruz filed a timely notice of appeal.

II. DISCUSSION

Santacruz challenges the sufficiency of the evidence to support the gang enhancement (§ 186.22, subd. (b)(1)(A)), contending also that the predicate offenses necessary to prove the required organizational connection uniting the alleged criminal street gang were legally invalid under our Supreme Court's decision in *Prunty*. Santacruz further contends that the proof of the predicate offenses was based in part on the expert's hearsay testimony in violation of *Sanchez*. Asserting that the evidence in support of the gang enhancement was thus improperly admitted and that the jury was permitted to rely on a legally invalid theory to find the required predicate offenses necessary to prove that the gang engaged in a pattern of criminal activity, Santacruz argues that the gang enhancement should be stricken. Santacruz also argues that there is not substantial evidence to support his conviction for resisting arrest (§ 148).

A. Gang Enhancement Term

Section 186.22, subdivision (b)(1), provides in relevant part: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the

benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony" be "punished by an additional term of two, three, or four years at the court's discretion." (§ 186.22, subdivision (b)(1)(A).)

For purposes of section 186.22, " 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the [enumerated] criminal acts . . ., having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, *a pattern of criminal gang activity*." (§ 186.22, subd. (f), italics added.) A " 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the [specified] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).) "To prove that a criminal street gang exists in accordance with these statutory provisions, the prosecution must demonstrate that the gang satisfies the separate elements of the STEP Act's [Street Terrorism Enforcement and Prevention Act] definition and that the defendant sought to benefit that particular gang when committing the underlying felony." (*Prunty*, *supra*, 62 Cal.4th at p. 67.)

1. Standard of Review

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the

evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

2. People v. Prunty

In *Prunty*, the California Supreme Court decided "…what type of showing the prosecution must make when its theory of why a criminal street gang exists turns on the conduct of one or more gang subsets." (*Prunty, supra*, 62 Cal.4th at p. 67.) The Court reasoned that "the STEP Act requires the prosecution to introduce evidence showing an associational or organizational connection that unites members of a putative criminal street gang." (*Id.* at p. 67.) Consequently, "when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Id.* at pp. 67-68.)

Establishing the existence of a relationship between the gang and its subsets requires evidence showing the group that committed the predicate offenses is the same group that the defendant sought to benefit. (*Prunty, supra*, 62 Cal.4th at p. 72.) It is not enough to show that "the group simply shares a common name, common identifying symbols, and a common enemy." (*Id.* at p. 72.) The prosecution may not "introduce evidence of different subsets' conduct to satisfy the primary activities and predicate offense requirements without demonstrating that those subsets are somehow connected to each other or another larger group." (*Id.* at p. 72.)

When the prosecution seeks to prove the existence of a single criminal street gang by offering the conduct of one or more gang subsets, the prosecution must show some associational or organizational connection uniting those subsets. "That connection may

take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization." (*Prunty*, *supra*, 62 Cal.4th at p. 71, fn. omitted.)

The Supreme Court in *Prunty* recognized that the facts of a particular case "may suggest the existence of behavior reflecting such a degree of collaboration, unity of purpose, and shared activity to support a fact finder's reasonable conclusion that a single organization, association, or group is present." (*Prunty*, *supra*, 62 Cal.4th at p. 78.) In such situations, it may be possible for "prosecutors to show that members of the various subsets collaborate to accomplish shared goals. For instance, the evidence may show that members of different subsets have 'work[ed] in concert to commit a crime,' [citation], or that members have strategized, formally or informally, to carry out their activities." (*Id.* at p. 78, fn. omitted.) "Evidence—even indirect evidence—showing collaboration among subset members, long-term relationships among members of different subsets, use of the same 'turf,' behavior demonstrating a shared identity with one another or with a larger organization, and similar proof will show that individual subsets are part of a larger group." (*Prunty*, *supra*, 62 Cal.4th at pp. 73-74.) "In general, evidence that shows subset members have communicated, worked together, or share a relationship (however formal or informal) will permit the jury to infer that the subsets should be treated as a single street gang." (*Id.* at pp. 78-79.)

Santacruz argues that the evidence is insufficient to support a finding that predicate offenses two and three, which Officer Le testified involved gang members who associated with the El Hoyo Palmas neighborhood, and predicate offense four, which he testified involved gang members who associated with the Seven Trees Norteños were

"committed for the benefit of, at the direction of, or in association with [the Norteño] criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) However, Santacruz concedes that Officer Le testified to facts regarding the offense committed by Palacios in predicate one, and the offense in predicate five that are sufficient to demonstrate that these felonies were committed to benefit the Norteños. Santacruz argues that despite the fact that two of the predicate offenses were adequately proven, the enhancement must be stricken because the remaining three predicates were invalid, and the jury was instructed with an invalid legal theory because it was permitted to consider the three invalid predicate offenses.

3. Insufficient Evidence That Subsets Benefited Larger Norteño Gang

The prosecution must demonstrate the same group engaged in primary activities and committed the predicate offenses-in this case the Norteños. (*Prunty*, *supra*, 62 Cal.4th at p. 82.) The three challenged predicate offenses in this case were shown through the convictions of members of the El Hoyo Palmas subset in predicate offenses two and three, and members of the Seven Trees Norteños subset in predicate offense four. Although Officer Le testified that these crimes were committed for the benefit of the Norteños overall, he did not describe the relationship between these subsets. Officer Le's testimony did not show how the El Hoyo Palmas and Seven Trees Norteños subsets shared information, defended the same territory, had members in the same vicinity, or otherwise behaved in a manner permitting the inference of an associational or organizational connection between them. In addition, Officer Le's testimony failed to demonstrate that the El Hoyo Palmas and Seven Trees Norteños members self-identified as members of the larger Norteño gang that defendant sought to benefit. (*Prunty*, *supra*, 62 Cal.4th at p. 82.)

Officer Le opined several times that the members of El Hoyo Palmas and the Seven Trees Norteños subsets were also members of the Norteño gang, but failed to demonstrate in concrete and specific terms the links among these subsets and their

members to the larger Norteño gang. He did not, for instance, describe an overarching governance that extended from the Norteño gang to the El Hoyo Palmas and Seven Trees Norteños subsets, or the exchange of information between the larger gang and the subsets or between the subsets, or crimes committed by the subsets at the direction of the larger Norteño organization or its "shot callers." The subsets identified in the predicate offenses two, three, and four, thus were not directly linked to the Norteño gang as required by *Prunty*.

With evidence similar to that offered in the present case, courts have found the evidence deficient to prove predicates committed by subset gangs in light of *Prunty*. (*People v. Franklin* (2016) 248 Cal.App.4th 938, 950-951 [generalized testimony about link between larger organization and subsets not sufficient evidence of associational connections between the two other]; *People v. Cornejo* (2016) 3 Cal.App.5th 36, 48–49 [evidence of shared ideologies between subsets is insufficient without evidence of behavior demonstrating the connection]; *People v. Ramirez* (2016) 244 Cal.App.4th 800, 815-816 [gang expert's testimony that subsets "aligned" with larger organization was insufficient without specific evidence that the subsets were connected to one another or to the overarching gang].) Based on the record before us, we agree with Santacruz that the prosecution failed to establish a sufficient gang affiliation between the El Hoyo Palmas and Seven Trees Norteño subsets and with the larger Norteño gang. We conclude therefore that there was insufficient evidence presented at trial to support predicate offenses two, three, and four. This, however, does not end our analysis concerning the sufficiency of the evidence to support the gang enhancement.

4. Invalid Legal Theory to Support Gang Enhancement

Santacruz asserts that the gang enhancement must be stricken because the jury was instructed on an invalid legal theory, i.e., that the offenses in predicates two, three, and four could establish a pattern of criminal activity necessary to prove the gang enhancement. He argues that although predicates one and five were sufficient to support

the enhancement, because all five were submitted to the jury, and three of the offenses were legally invalid, there is no way to determine which predicate offenses served as the basis for the jury's verdict. As a result of the legal flaw, the enhancement fails and must be stricken under this theory.

In support of his argument, Santacruz cites *People v. Green* (1980) 27 Cal.3d 1 (*Green*). In *Green*, the defendant was convicted of multiple offenses, including kidnapping. (*Id.* at p. 11.) The defendant's friend lured the victim by false pretenses into a car and then drove her to a nearby house where the defendant was waiting. (*Id.* at pp. 62-63.) The two men then drove with the victim 20 miles to a secluded area. (*Ibid.*) Once there, the defendant ordered the victim from the car and forced her to walk 90 feet from the vehicle where he shot and killed her. (*Id.* at pp. 63, 65.)

At trial, the jury was instructed that there were three distinct acts of asportation of the victim upon which the jury could base its kidnapping verdict: the fraudulent inducement of the victim to enter the car, the 20-mile drive to the remote location, and the forced 90-foot walk. (*Green*, *supra*, 27 Cal.3d at pp. 62-63.) The *Green* court found that only the 20-mile drive was legally sufficient to qualify as asportation of the victim. (*Id.* at p. 67.) The court reversed the defendant's kidnapping conviction because it could not determine upon which segment the jury relied in finding the defendant guilty. (*Id.* at pp. 67, 74.) In doing so, the court stated the following general rule: "[W]hen the prosecution presents its case to the jury on alternative theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Green*, *supra*, 27 Cal.3d at p. 69.) The *Green* court held this general rule requires reversal when the alternate theory is either legally erroneous, or "when the defect in the alternate theory is not legal but factual, i.e., when the reviewing court holds the evidence insufficient to support the conviction on that ground." (*Id.* at p. 70.)

Notwithstanding the rule set forth in *Green,* in *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*), the California Supreme Court affirmed the defendant's conviction for selling or transporting cocaine when there was insufficient evidence to show he sold the drug, but sufficient evidence to show he transported it. (*Id.* at pp. 1119, 1131.) The *Guiton* court considered *Green* in light of the United States Supreme Court's decision in *Griffin v. United States* (1991) 502 U.S. 46 (*Griffin*), where the Supreme Court affirmed a conspiracy conviction when the evidence was sufficient to implicate the defendant in one object of the conspiracy but not the other.

The *Guiton* court found persuasive a distinction recognized in *Griffin* between legal error or a mistake of law, on the one hand, which are subject to the rule generally requiring reversal, and insufficiency of proof or mistake concerning the weight or the factual import of the evidence, which do not require reversal when another valid basis for conviction exists. (*Guiton, supra*, 4 Cal.4th at p. 1125; *Griffin, supra,* 502 U.S. at p. 59.)

In order to harmonize the rationale of *Green* and *Griffin*, the *Guiton* court held that "[i]f the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green*, the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*Guiton, supra,* 4 Cal.4th at p. 1129.)

In addition to arguing that the evidence was insufficient to support predicate offenses two, three and four, Santacruz maintains that the inadequacy of the predicates to support the gang enhancement constitutes a legal flaw that the jury could not reasonably detect. Santacruz asserts that the present case is akin to *Green*, where the jury was instructed that any of the three segments of asportation could support the kidnapping conviction, yet only one was legally valid. The jury in *Green* was not in a position to

determine which of the three segments of asportation was legally valid. Similarly, here, Santacruz argues that the jury was not in a position to know that in order for an offense committed by members of a subset gang to adequately support the gang enhancement, the subset must have been linked to the larger Norteño gang that Santacruz was intending to benefit. Here, the jury was not instructed about the connection of subset gangs to the larger gang; instead, the jury was instructed that it could find a pattern of criminal activity if it found any two of the five alleged predicate offenses proved, so long as at least one was committed after September 26, 1988, the most recent crime occurred within three years of one of the earlier crimes and the crimes were committed on separate occasions or were personally committed by two or more persons.

We disagree with Santacruz that presenting predicate offenses two, three, and four to support the gang enhancement was tantamount to presenting the jury with an invalid legal theory as was the case in *Green*. We conclude this case is not one in which the jury was presented with a legally invalid theory; rather, the jury was " 'left the option of relying upon a factually inadequate theory,' or, also phrased slightly differently, [a case] in which there was an 'insufficiency of proof.' " (*Guiton, supra,* 4 Cal.4th at p. 1128 quoting *Griffin, supra,* 502 U.S. at p. 59.) Here, the determination of whether predicate offenses two, three and four are valid under *Prunty* is based on whether there is substantial evidence to support them. Indeed, *Prunty* itself considered the sufficiency of the evidence to support the predicates, as have numerous cases following that decision (See, e.g. *People v. Franklin, supra,* 248 Cal.App.4th at pp. 950-951; *People v. Cornejo, supra,* 3 Cal.App.5th at pp. 48-49; *People v. Ramirez, supra,* 244 Cal.App.4th at pp. 815-816.)

Santacruz is correct that we cannot determine from this record if the jury relied on the invalid predicate offenses when finding the gang enhancement true; however, this fact does not necessarily justify striking the gang enhancement. As the court stated in *Guiton*: "[R]eversal might be necessary if the record affirmatively demonstrates there was

prejudice, that is, if it shows that the jury did in fact rely on the unsupported ground. . . . we will not *assume* prejudice, but the record may show it. . . . We may, for example, hypothesize a case in which the district attorney stressed only the invalid ground in the jury argument, and the jury asked the court questions during deliberations directed solely to the invalid ground. In that case, we might well find prejudice. The prejudice would not be assumed, but affirmatively demonstrated." (*Guiton, supra*, 4 Cal.4th at p. 1129.)

Here, Santacruz has not affirmatively demonstrated that he was prejudiced by the introduction of the invalid predicate offenses. As Santacruz concedes, there is substantial evidence that predicate offense one committed by Palacios and the felonies committed in predicate offense five demonstrate a pattern of criminal behavior of the Norteño gang. Section 186.22, subd. (e), requires that only two predicate offenses be proven in order to impose the enhancement. Because there are two such offenses, Santacruz cannot show there is a reasonable probability that but for the error in presenting three invalid predicates, he would have received a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818.) We therefore conclude that despite the inadequacy of three predicate offenses offered into evidence by the prosecution, the introduction of two predicate offenses supported by substantial evidence is sufficient to withstand a challenge to the enhancement under *Prunty*.

B. Hearsay Evidence Under Sanchez

Santacruz next asserts that under *Sanchez*, his Sixth and Fourteenth Amendment rights to confrontation were violated by the expert's use of hearsay evidence in his testimony. Specifically, Santacruz argues that in order to prove the five predicate crimes, Officer Le testified to specific facts contained in police reports. In addition, Santacruz asserts that Officer Le testified to inadmissible hearsay to prove that Santacruz and his codefendants were members of the Norteño gang.

1. Forfeiture

Respondent argues that Santacruz forfeited his challenge to Officer Le's statements on hearsay grounds because he failed to object in the trial court.

There is a split of authority in the California Courts of Appeal regarding whether a defendant forfeits the issue of the admissibility of hearsay evidence to prove a gang enhancement by failing to object in cases tried before the *Sanchez* decision. (*People v. Veamatahau* (2018) 24 Cal.App.5th 68, 72, review granted September 12, 2018, S249872, [defendant did not forfeit case-specific hearsay objections by failing to make them below]; *People v. Flint* (2018) 22 Cal.App.5th 983, 996-997 [same]; *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 506 (*Jeffrey G.*) [same]; *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1283 [failure to object in the trial court did not forfeit *Sanchez* claim on appeal where objection "would have been clearly, and correctly, overruled"]; *People v. Blessett* (2018) 22 Cal.App.5th 903, 940-941 [requiring an objection in the trial court to preserve confrontation clause claim on appeal did not place unreasonable burden on defendant to anticipate unforeseen changes in the law]; *People v. Perez* (2018) 22 Cal.App.5th 201, 211-212, 231 [*Sanchez* was not significant change in law that excused counsel's failure to object to hearsay at trial].)

Here, Santacruz's trial occurred before *Sanchez* was decided. We are persuaded by the rationale in cases finding no forfeiture for failing to object in the trial court. Any objection by Santacruz would have been futile under then existing law.[2] (*Jeffrey G.*, *supra*, 13 Cal.App.5th at p. 506.)

[2] Because we find that Santacruz did not forfeit the issue of the admissibility of hearsay evidence to prove the gang enhancement by failing to object in the trial court, we do not address Santacruz's alternative argument that he was denied effective assistance of counsel.

2. People v. Sanchez

In *People v. Sanchez*, the California Supreme Court considered the issue of whether an expert may testify to hearsay evidence when offering an opinion. (*Sanchez, supra*, 63 Cal.4th at pp. 670-671.) The defendant was convicted of being a felon in possession of a firearm (former § 12021, subd. (a)(1), § 29800, subd. (a)(1)), possessing drugs while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)), and being an active gang member (§ 186.22, subd. (a)). An enhancement allegation that he committed the offenses for the benefit of a gang was found true (§ 186.22, subd. (b)(1)). (*Sanchez*, at pp. 671-673.) A detective who testified as an expert for the prosecution opined that the defendant was a gang member. The detective also testified that hypothetical crimes based on the conduct for which the defendant was on trial would be committed for the benefit of a gang. (*Id*. at pp. 672-673.) These opinions were based, in part, on police records containing officers' descriptions of several incidents in which the defendant was contacted by police under circumstances suggesting his involvement in gang activities. The detective recited the allegations in these documents while testifying. (*Ibid*.)

The *Sanchez* Court concluded that the gang expert's testimony relating case-specific information obtained from police reports was improper testimonial hearsay because it concerned case-specific facts "gathered during an official investigation of a completed crime." (*Sanchez*, *supra*, 63 Cal.4th at p. 694.) The expert testified about the portion of STEP notices retained by the police, which were signed by an officer under penalty of perjury and included the "defendant's biographical information, whom he was with, and what statements he made." (*Id.* at p. 696.) The Court held that this information was sufficiently formal to constitute testimonial hearsay. (*Id.* at pp. 696-697.)

The California Supreme Court held that the expert's descriptions of the defendant's past contacts with police were inadmissible and "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats

the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) The Court identified testimonial hearsay statements to be those made "primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Id.* at p. 689.)

The *Sanchez* Court did not limit an expert's use of all hearsay in forming an opinion. The court stated: "[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) Thus, "[g]ang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*Ibid*.) The Court recognized a distinction "between allowing an expert to describe the type or source of the matter relied upon" and "presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Id.* at p. 686.) The court stressed that what experts generally cannot do is "present, as facts, the content of testimonial hearsay statements." (*Id.* at p. 685.)

3. Gang Testimony

There were five predicate offenses alleged to support the gang enhancement in this case. In all but predicate offense four, Officer Le had no personal knowledge of the

crimes, and relied on his review of police reports to formulate his testimony. From these police reports, Officer Le stated his opinion that the crimes were gang related, and relayed facts about those crimes, explaining to the jury the nature of the crimes, what gangs the defendants belonged to and whether the crimes were committed for the benefit of a criminal street gang.

Officer Le testified to case-specific out-of-court statements when he relayed the contents of third-party police reports about predicate offenses one, two, three, and five. With regard to the first predicate offense, Officer Le testified that the defendants asked the victim if he "banged," and that one of the defendants was a Norteño. For the second predicate offense, Officer Le testified that one of the defendants was a member of the El Hoyo Palmas subset because he had an "EHP" tattoo, a four-dot tattoo, and had admitted his membership to law enforcement. When testifying about predicate offense three, Officer Le relayed evidence that the defendants were members of the El Hoyo Palmas subset of the Norteños. For predicate offense five, Officer Le testified that the defendants were Norteños and attacked the victim because he was a Sureño.

Predicate offense four is distinct from the other crimes offered by the prosecution in this case, because Officer Le was the lead investigator and had personal knowledge of the crime. Officer Le testified that Tadayo, Daniels, and Perez, the defendants in that case, were members of a Norteño subset, Seven Trees Norteños, and that the assaults were committed for the benefit of, at the direction of, or in association with the Norteños. Unlike the police reports that formed the basis of his opinion regarding the other predicate offenses, Officer Le's testimony about predicate offense four was based on his personal investigation of the case, as well as his own experience with criminal gangs. This testimony did not violate *Sanchez's* prohibition on the expert's use of inadmissible hearsay to demonstrate the gang-related nature of the crime and was properly admitted into evidence.

In addition to testifying about the predicate offenses, Officer Le offered his opinion that Santacruz, his codefendants, and Anthony Rocha were all members of the Norteño gang based on the facts of the current case, as well as information gleaned from police reports of past incidents involving the men. Specifically, Officer Le relayed information about three prior contacts that Santacruz had with police during which he was associating with known Norteño gang members and himself admitted to Norteño membership. Officer Le also offered his opinion that Santacruz's codefendants and Anthony Rocha were Norteño gang members based on similar information. Officer Le referred to facts from police and CAD reports, as well as Field Identification Cards. Officer Le testified about prior contacts all of the men had had with police officers, their tattoos and clothing that were indicative Norteño membership, their associations with known gang members, and their admissions to membership.

4. Prejudice

Officer Le's testimony about Santacruz and his codefendants' gang membership, as well as his opinion about four of the predicate offenses was based in part on police reports generated by other law enforcement officers. When Officer Le related "case-specific facts based upon out-of-court statements, and asserted those facts were true because he relied upon their truth in forming his opinion, he was reciting hearsay." (*Sanchez, supra*, 63 Cal.4th at p. 685.) Thus, under *Crawford*, the failure to afford Santacruz the opportunity to cross-examine the hearsay declarant constitutes a violation of the confrontation clause, and renders portions of Officer Le's testimony inadmissible. (*Sanchez*, at p. 685.) However, confrontation clause violations are subject to harmless error analysis. (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) "Determining prejudice requires an examination of the elements of the gang enhancement [or substantive crime] and the gang expert's specific testimony." (*Ibid.*)

The substantive gang crime enhancement applies to "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or

have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ." (§ 186.22, subd. (a).) The statute targets "gang members who acted *in concert* with other gang members in committing a felony regardless of whether such felony was gang related." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138.) The gang enhancement requires proof beyond a reasonable doubt that the defendant committed a felony "for the benefit of, at the direction of, or in association with any criminal street gang," and he or she did so "with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).)

Here, there was sufficient evidence to support the gang enhancement through Officer Le's non-hearsay testimony. First, properly admitted documentary evidence of the convictions related to the predicate offenses bolstered Officer Le's testimony that all of the predicate offenses were gang related. Through court records, the jury was presented with proof of the charges related to the predicate offenses, and particularly with the defendants' admissions in certified abstracts of judgment to the gang related crimes, the true findings and the gang enhancements. Thus, even without Officer Le's hearsay testimony, the jury had sufficient information to conclude that the predicate offenses, including those conceded by Santacruz to be valid under *Prunty*, were committed by the charged defendants for the benefit of a criminal street gang—because the defendants who committed those crimes themselves admitted as much when they pleaded guilty.

Officer Le also offered non-hearsay evidence based on his background and experience about the Norteño gang in San Jose, its history, structure, colors and symbols. He informed the jury about the types of crimes that the Norteños commit, and the language a member will use toward a victim before an attack, such as "Do you bang?" Officer Le testified to admissible evidence directly related to the charges against Santacruz, including that fact that Santacruz was wearing a red baseball cap, that Santacruz revealed a "P" tattoo, and that the words, "norte, norte, norte," were yelled

during the attack. These details provided vivid corroboration that the crime was committed for the benefit of the Norteño gang. When presented with two hypotheticals that involved similar facts as the present case, Officer Le opined that in both instances, the crimes were committed for the benefit of the Norteño gang.

Sanchez allows an expert to "*rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez, supra*, 63 Cal.4th at p. 685.) An expert may also tell the jury "generally the kind and source of the 'matter' upon which his opinion rests," so that the jurors can evaluate the probative value of the expert's testimony. (*Id*. at p. 686.) Officer Le testified and offered background information about the Norteño gang, his opinion that Santacruz and his codefendants were members of the Norteño gang, his opinion that hypotheticals based on the facts of the current case that the crimes were committed for the benefit of the Norteño gang, and that the five predicate offenses were committed by Norteño gang members. A portion of Officer Le's testimony about the above information was based on inadmissible hearsay under *Sanchez*; however, Officer Le also offered substantial information to the jury to support his opinion that was not based on hearsay, and was sufficient to prove the gang enhancement in this case. We therefore conclude that any error in admitting hearsay evidence that violated Santacruz's Sixth Amendment right to confront adverse witnesses was harmless beyond a reasonable doubt. (*Sanchez, supra,* 63 Cal.4th at p. 698; *Chapman v. California* (1967) 386 U.S. 18, 24.)

C. Substantial Evidence to Support Conviction for Resisting Arrest

Defendant argues that there is not sufficient evidence to support his misdemeanor conviction for resisting, delaying, or obstructing a peace officer (§ 148).

In considering this claim, " 'we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Avila* (2009)

46 Cal.4th 680, 701.) " '[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' " (*Id.* at p. 703.)

A defendant resists, delays, or obstructs a peace officer in violation of section 148, subdivision (a)(1) if the defendant (1) "willfully resists, delays, or obstructs a peace officer" (2) when the officer is "engaged in the [lawful] performance of his or her duties" and (3) the defendant "knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." (*In re J.C.* (2014) 228 Cal.App.4th 1394, 1399.) The offense is "a general intent crime, proscribing only the particular act (resist, delay, obstruct) without reference to an intent to do a further act or achieve a future consequence." (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.)

Defendant argues that he complied "slowly" with the officer's command to lie on the ground. He points to the fact that he was not physically combative with the officer. Defendant relies primarily on *People v. Quiroga* (1993) 16 Cal.App.4th 961 (*Quiroga*), which held that section 148 does not "criminalize[ ] a person's failure to respond with alacrity to police orders." (*Quiroga,* at p. 966.) In *Quiroga,* although the defendant was uncooperative and argumentative in responding to police officers' orders to sit, to put his hands on his lap, and to stand, the defendant eventually complied "slowly" with each order. (*Id.* at pp. 964, 966.) However, here, Santacruz did not merely respond slowly to the officer's commands. The evidence shows that Officer Byers yelled at Santacruz to get down many times, but Santacruz alternated "between being down on his hands and knees, to being up on one knee with one foot down . . . ." Instead of putting his hands in front of him, Santacruz reached underneath his jacket two separate times. It was not until Officer Byers kicked Santacruz in the face that Santacruz complied with the orders and laid with his chest on the ground and put his hands in front of him.

We distinguish this case from *Quiroga,* where the defendant's lack of cooperation consisted in large part of oral criticism of the police officer. Santacruz continued to

disobey Officer Byers's commands throughout the encounter; by reaching underneath his jacket twice he also affirmatively acted in a manner that was consistent with a threat to officer safety. We conclude that substantial evidence supports the jury's finding that Santacruz resisted, delayed or obstructed the officer in the performance of his duties.

D. Senate Bill 1393[3]

When the trial court sentenced defendant, imposition of the section 667, subdivision (a)(1) five-year enhancement for sustaining a prior serious felony conviction was mandatory. (§ 1385, subd. (b).) A recent legislative change, however, deletes the provision of section 1385 and related language in section 667 itself that made imposition of a section 667 prior serious felony conviction enhancement mandatory, thereby permitting trial courts to strike such enhancements when found to be in the interest of justice. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1, 2.) The changes made by Senate Bill 1393 took effect on January 1, 2019. (See *People v. Camba* (1996) 50 Cal.App.4th 857, 865.)

Santacruz argues, and the Attorney General agrees, that the change in law set forth in Senate Bill 1393 would apply retroactively to Santacruz under the principles espoused in *People v. Francis* (1969) 71 Cal.2d 66 and *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). Under *Estrada's* retroactivity principles, Senate Bill 1393's change in law will apply to defendant so long as his conviction was not legally "final" before Senate Bill 1393 took effect on January 1, 2019. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306 (*Vieira*); *Estrada*, *supra*, at p. 744.) Santacruz's conviction will not be final until the time for seeking certiorari in the United States Supreme Court expires. (*Vieira*, at p. 306.) Thus, as the Attorney General acknowledges, Santacruz's conviction will be final after Senate Bill 1393 took effect on January 1, 2019—the time to

[3] On November 19, 2018, we granted Santacruz's motion for leave to file a supplemental brief regarding the applicability of Senate Bill 1393 to his case. The Attorney General filed a supplemental reply.

file a petition for certiorari will expire only after 90 days from the date our Supreme Court enters judgment in this case or denies discretionary review. (28 U.S.C. § 2101(d); U.S. Supreme Ct. Rules, rule 13(1).)

III. DISPOSITION

The matter is remanded for the trial court to consider whether to strike the section 667, subd. (a)(1) enhancement under section 1385, as amended by Senate Bill 1393. In all other respects, the judgment is affirmed.

_____
Greenwood, P.J.

WE CONCUR:

_____
Bamattre-Manoukian, J.

_____
Grover, J.

People v. Santacruz
No. H042630